UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 208

Docket No. SF-0353-09-0553-I-1

Lin Yang,

Appellant,

v.

United States Postal Service,

Agency.

October 28, 2010

Juan Lamas, Pasadena, California, for the appellant.

Carla Ceballos, Esquire, Long Beach, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed her restoration appeal for lack of jurisdiction. For the reasons set forth below, we DENY the petition for failure to meet the Board's review criteria under 5 C.F.R. § 1201.115(d), REOPEN the appeal on the Board's own motion under 5 C.F.R. § 1201.118, REVERSE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant is a non-preference eligible Mail Processing Clerk at the agency's Pasadena Processing and Distribution Center (P&DC). Initial Appeal

File (IAF), Tab 1 at 1, Tab 5, Subtab 1. The appellant suffered compensable injuries in 1989 and on June 1, 2000, and thereafter began work in a series of limited duty assignments,[1] most recently in an assignment where she was required to perform various casing and internal mail processing functions for 8 hours per day. IAF, Tab 5, Subtabs 2-5, Tab 6 at 10-11.

¶3 In 2009, the Sierra Coastal District, of which the Pasadena P&DC is a part, began to participate in a National Reassessment Process (NRP) Pilot Program. IAF, Tab 1 at 1, Tab 6 at 5-6. Under the NRP, supervisors and managers of employees performing limited duty review those employees' assignments to ensure that they are consistent with the employees' medical restrictions and contain only "operationally necessary tasks." IAF, Tab 6 at 35, Tab 9 at 10-12. If a limited duty assignment does not meet these criteria, the NRP prescribes procedures for identifying and offering alternative limited duty assignments that do meet the criteria. IAF, Tab 9 at 12-15. If the supervisor or manager is unable to identify any operationally necessary tasks available within the employee's work restrictions, the employee will be placed on leave until such work becomes available or his medical restrictions change. *Id*. at 13-14, 16. If there are operationally necessary tasks available within the employee's work restrictions, but not enough to provide the employee with a full day's work, the employee will be scheduled to work partial days, i.e. she will remain in duty status long enough to complete the operationally necessary tasks available and be placed on leave for the remainder of the workday. *Id*. at 15. This arrangement will continue until either the availability of work or the employee's medical restrictions change. *Id*. at 15-16. During the employee's absence, she will account for work hours

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[1] In the U.S. Postal Service, "limited duty" refers to modified work provided to employees who have medical restrictions due to work-related injuries, whereas "light duty" refers to modified work provided to employees who have medical restrictions due to nonwork-related injuries. *Simonton v. U.S. Postal Service*, 85 M.S.P.R. 189, ¶ 8 (2000).

through the use of approved leave, leave without pay, or a continuation of pay.[2] *Id*. at 13-15.

¶4 On April 8, 2009, the agency issued the appellant a letter stating in relevant part that, because there was no operationally necessary work available for the appellant within her medical restrictions and within her regular duty hours at the Pasadena P&DC, the appellant should not report again for duty unless she was informed that such work had become available. IAF, Tab 6 at 37. During this absence, the agency directed the appellant to account for her work hours through the use of leave or continuation of pay. *Id*.

¶5 The appellant filed a Board appeal of the agency's action, alleging that the agency improperly denied her restoration and that the agency's action constituted a "violation of the Federal Disability Act and Rehabilitation Act." IAF, Tab 1 at 2-3. The administrative judge issued an acknowledgment order notifying the appellant of her jurisdictional burden in a restoration appeal as a partially recovered employee and ordering her to file evidence and argument on the issue. IAF, Tab 2 at 2. The appellant responded, addressing the pertinent issues, IAF, Tabs 5, 11, 16, and the agency moved to dismiss the appeal for lack of jurisdiction, IAF, Tab 6 at 4-8. The appellant withdrew her request for a hearing. IAF, Tab 1 at 2, Tab 8.

¶6 The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. IAF, Tab 18, Initial Decision (ID) at 2, 9. He found that, although the appellant made nonfrivolous allegations satisfying the first three jurisdictional criteria for a restoration appeal as a partially recovered employee, the appellant failed to make a nonfrivolous allegation that the agency's denial of restoration was arbitrary and capricious. ID at 4-8 & n.2. Because the administrative judge found that the Board lacks jurisdiction over the appellant's

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[2] The right to continuation of pay is governed by 20 C.F.R. part 10, subpart C.

restoration claim, he declined to consider the appellant's disability discrimination claim. ID at 8.

¶7 The appellant has filed a petition for review, arguing that the administrative judge erred in finding that she failed to make a nonfrivolous allegation that the agency's discontinuation of her limited duty assignment constituted an arbitrary and capricious denial of restoration. Petition for Review File (PFR File), Tab 1 at 2. The agency has not filed a response.

ANALYSIS

Denial of Restoration

¶8 The Federal Employees' Compensation Act and its corresponding regulations at 5 C.F.R. part 353 provide that federal employees who suffer compensable injuries enjoy certain rights to be restored to their previous or comparable positions. 5 U.S.C. § 8151; *Walley v. Department of Veterans Affairs*, 279 F.3d 1010, 1015 (Fed. Cir. 2002), *abrogated on other grounds by Garcia v. Department of Homeland Security*, 437 F.3d 1322 (Fed. Cir. 2006); *Tat v. U.S. Postal Service*, 109 M.S.P.R. 562, ¶ 9 (2008). In the case of a partially recovered employee, i.e., one who cannot resume the full range of regular duties but has recovered sufficiently to return to part-time or light duty or to another position with less demanding physical requirements, an agency must make every effort to restore the individual to a position within her medical restrictions and within the local commuting area.[3] *Delalat v. Department of the Air Force*, 103 M.S.P.R. 448, ¶ 17 (2006); 5 C.F.R. §§ 353.102, 353.301(d).

[3] The appellant alleged that her medical conditions are permanent and stationary. IAF, Tab 16 at 3. Therefore, the appellant may be "physically disqualified" as that term is defined under 5 C.F.R. § 353.102. However, because more than 1 year has passed since the appellant was first eligible for workers' compensation, the administrative judge correctly found that she is entitled to the restoration rights of a partially recovered employee. ID at 3-4; *see Kravitz v. Department of the Navy*, 104 M.S.P.R. 483, ¶ 5 (2007); 5 C.F.R. § 353.301(c), (d).

¶9 "An individual who is partially recovered from a compensable injury may appeal to MSPB for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration." 5 C.F.R. § 353.304(c). To establish Board jurisdiction over a restoration claim as a partially recovered employee, an appellant must make a nonfrivolous allegation that: (1) She was absent from her position due to a compensable injury; (2) she recovered sufficiently to return to duty on a part-time basis, or to return to work in a position with less demanding physical requirements than those previously required of her; (3) the agency denied her request for restoration; and (4) the agency's denial was "arbitrary and capricious." *Chen v. U.S. Postal Service*, 97 M.S.P.R. 527, ¶ 13 (2004); *see* 5 C.F.R. § 353.304(c).

¶10 For the reasons explained in the initial decision, the appellant made nonfrivolous allegations sufficient to satisfy the first three jurisdictional criteria. ID at 4-5; IAF, Tab 5 at 3-4. Although the agency argued below that its discontinuation of the appellant's limited duty assignment did not constitute a denial of restoration, IAF, Tab 6 at 6-7, the administrative judge correctly found that it did, ID at 5; *see Sanchez v. U.S. Postal Service*, 114 M.S.P.R. 345, ¶ 11 (2010); *Brehmer v. U.S. Postal Service*, 106 M.S.P.R. 463, ¶ 9 (2007) (discontinuation of a limited duty position may constitute a denial of restoration for purposes of Board jurisdiction under 5 C.F.R. part 353). The appellant's allegations are supported by documentary evidence, IAF, Tab 5, Subtabs 2-3, 6, 8, 12-13, and the agency has not challenged the administrative judge's findings on review.

¶11 Regarding the fourth jurisdictional criterion, we agree with the administrative judge that the appellant's submissions themselves fail to raise a nonfrivolous allegation that the agency's denial of restoration was arbitrary and capricious, ID at 5-8 & n.2, and we find that the appellant's arguments on review provide no basis to disturb the administrative judge's finding, PFR File, Tab 1 at 2. The appellant argued that she does not fall into the category of employees

properly subjected to the NRP. IAF, Tab 5 at 5. However, the agency's decision to subject the appellant to the NRP does not pertain to the issue of whether it satisfied its regulatory restoration obligations under 5 C.F.R. § 353.301(d). The appellant also argued that she was entitled to remain in her limited duty assignment regardless of whether her duties were "operationally necessary." IAF, Tab 5 at 6, Tab 11 at 3. However, the Board has previously rejected this argument, finding that the limited duty assignments of current employees are contingent upon there being necessary work available for them to perform in furtherance of the agency's mission. *See Chen v. U.S. Postal Service*, 114 M.S.P.R. 292, ¶ 10 & n.3 (2010). The appellant also argued that the agency's decision to discontinue her limited duty assignment was not based on an individualized assessment, IAF, Tab 5 at 6-7, but she has not alleged any facts to support her claim, which is unsupported by the record, IAF, Tab 6 at 37; *see Urena v. U.S. Postal Service*, 113 M.S.P.R. 6, ¶ 11 (2009) ("Facts without support do not constitute nonfrivolous allegations."). The appellant also alleged that there was a position open for bid that she could have performed with reasonable accommodations, that she successfully bid for the position, and that the agency improperly found her unqualified to receive the bid because of her medical restrictions. IAF, Tab 16 at 1-3, Subtabs 16-18. However, as the administrative judge correctly found, the bid position had a lifting requirement of 70 pounds, the appellant has a lifting restriction of 25 pounds, and the appellant has not explained what accommodation might allow her to perform in a position where she cannot meet even half of the lifting requirement.[4] ID at 8 n.2; IAF, Tab 5, Subtab 8 at 2, Tab 16, Subtabs 16-18; *see also Pickens v. Social Security Administration*, 88 M.S.P.R. 525, ¶ 7 (2001) (in order to establish a prima facie case of disability discrimination, an appellant must, to the extent possible,

[4] The position at issue is a Mail Processing Clerk position – the same position that the appellant currently holds but in which she cannot perform because of her medical restrictions. IAF, Tab 5, Subtabs 1, 8, Tab 16, Subtabs 16-18.

articulate a reasonable accommodation under which she believes she could perform the essential duties of the position at issue).

¶12 The appellant argues on review that the administrative judge failed to consider her argument that the agency's action was arbitrary and capricious according to a particular arbitration decision, *In re Arbitration between U.S. Postal Service and American Postal Workers Union*, Case No. E90C-4E-C 95076238 (2002) (Das, Arb.). PFR File, Tab 1 at 2; IAF, Tab 5 at 5-6, Subtab 14. However, the administrative judge did consider this argument, and he correctly found that it does not constitute a nonfrivolous allegation that the agency's action was arbitrary and capricious. ID at 6-7; *see Chang v. U.S. Postal Service*, 114 M.S.P.R. 258, ¶ 8 (2010). The remainder of the appellant's arguments on review constitute mere disagreement with the initial decision and therefore provide no basis to grant the petition for review. PFR File, Tab 1 at 2; *see Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam) (mere disagreement with the administrative judge's findings and credibility determinations does not warrant full review of the record by the Board).

¶13 Although the appellant's documentary submissions themselves are insufficient to satisfy the fourth jurisdictional criterion, the agency's documentary submissions are sufficient to render nonfrivolous the appellant's allegation that the denial of restoration was arbitrary and capricious. *See Sanchez*, 114 M.S.P.R. 345, ¶¶ 12-14; *see also Baldwin v. Department of Veterans Affairs*, 109 M.S.P.R. 392, ¶¶ 11, 32 (2008) (the Board may consider the agency's documentary submissions in finding that an appellant has made a nonfrivolous allegation of Board jurisdiction). The Office of Personnel Management's (OPM) regulations provide:

> Agencies must make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. At a minimum, this would mean treating

> these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973, as amended.

5 C.F.R. § 353.301(d). The Board has interpreted this regulation as requiring agencies to search within the local commuting area for vacant positions to which an agency can restore a partially recovered employee and to consider him for any such vacancies. *Sanchez*, 114 M.S.P.R. 345, ¶ 12; *see Sapp v. U.S. Postal Service*, 73 M.S.P.R. 189, 193-94 (1997).

¶14 "For restoration rights purposes, the local commuting area is the geographic area in which an individual lives and can reasonably be expected to travel back and forth daily to his usual duty station." *Hicks v. U.S. Postal Service*, 83 M.S.P.R. 599, ¶ 9 (1999). It includes any population center, or two or more neighboring ones, and the surrounding localities. *Sapp*, 73 M.S.P.R. at 193. The question of what constitutes a local commuting area is one of fact. The extent of a commuting area is ordinarily determined by factors such as common practice, the availability and cost of public transportation or the convenience and adequacy of highways, and the travel time required to go to and from work. *E.g.*, *Sanchez*, 114 M.S.P.R. 345, ¶ 13.

¶15 In this case, all of the evidence shows that the agency searched for a suitable position for the appellant only at the Pasadena P&DC. IAF, Tab 6 at 6-8, 37. Unless the Pasadena P&DC is the only agency facility in the local commuting area, the applicable regulation requires a more extensive search. *See* 5 C.F.R. § 353.301(d). Because the agency's search for available work was apparently limited to a single facility, it appears that the agency failed to search the entire local commuting area as required by OPM's regulation. *See* 5 C.F.R. § 353.301(d). Evidence that the agency failed to search the entire local commuting area as required by 5 C.F.R. § 353.301(d) constitutes a nonfrivolous allegation that the agency acted arbitrarily and capriciously in denying restoration. *See Barachina v. U.S. Postal Service*, 113 M.S.P.R. 12, ¶ 7 (2009); *Urena*, 113 M.S.P.R. 6, ¶ 13. Because the appellant made nonfrivolous allegations satisfying all of the jurisdictional criteria, we find that the Board has

jurisdiction to consider the merits of her restoration appeal. *See Sanchez*, 114 M.S.P.R. 345, ¶ 14.

¶16 Although the documentary evidence suggests that the agency failed to search the entire local commuting area, the evidence in the record is insufficient for the Board to determine the extent of the local commuting area on review. Therefore, in the interest of justice, we reopen the record for further development on this issue, including the opportunity for further discovery by the parties. *See Sapp*, 73 M.S.P.R. at 193-94 (the Board remanded the appeal for further development of the record regarding what constituted the "local commuting area" and whether the agency's job search properly encompassed that area).

¶17 Because the Board has jurisdiction to consider the merits of the restoration appeal, the administrative judge must also adjudicate the appellant's disability discrimination claim on remand. IAF, Tab 1 at 3, Tab 16 at 2-3; *see* 5 U.S.C. § 7702(a)(1); *Sanchez*, 114 M.S.P.R. 345, ¶ 14. In adjudicating the disability discrimination claim, the administrative judge shall follow the Board's guidance in *Tram v. U.S. Postal Service*, 114 M.S.P.R. 413, ¶¶ 12-13 (2010), *Sanchez*, 114 M.S.P.R. 345, ¶¶ 16-19, and *Luna v. U.S. Postal Service*, 114 M.S.P.R. 273, ¶ 16 (2010).

Part-Day Restoration

¶18 The appellant alleged that, on May 12, 2009, the agency offered her a temporary limited duty assignment involving 2 hours of work per day, and that she began work in that position on May 19, 2009, although the agency routinely sends her home from this assignment after only 1 hour. IAF, Tab 5 at 4, Tab 11 at 2. The administrative judge did not address the issue of whether the appellant's eventual restoration to part-time limited duty rather than full-time limited duty constituted a denial of restoration for purposes of Board jurisdiction. Because it will likely be necessary to resolve this issue in adjudicating the merits of the appeal, we address it on review.

¶19 The Board has found that when the agency awards an employee a full-time limited duty assignment and then reduces the employee's hours to part time under the NRP, the agency has denied the employee restoration. *Kinglee v. U.S. Postal Service*, 114 M.S.P.R. 473, ¶¶ 13-14 (2010). The facts of the instant appeal are somewhat different than in *Kinglee* because the appellant in this case was completely out of work for over a month between the date that the agency discontinued her full-time limited duty assignment and the date that it returned her to limited duty part time, IAF, Tab 5 at 4, Tab 6 at 37, whereas the appellant in *Kinglee* was never out of work entirely, but went directly from a full-time limited duty assignment to a part-time limited duty assignment, 114 M.S.P.R. 473, ¶¶ 3-4. Nevertheless, we see no material distinction between the two cases, and we find that the merits of the agency's decision to restore the appellant to part-time limited duty rather than full-time limited duty is within the Board's jurisdiction under the particular circumstances of this case. *See Kinglee*, 114 M.S.P.R. 473, ¶¶ 14-15.

ORDER

¶20 Accordingly, we reverse the initial decision and remand the appeal to the Western Regional Office for further adjudication of the appeal consistent with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.